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(3)

No. 10-176

In The

Supreme Court of the United States

TRACEY YOUNG,

Petitioner,

vs.

STATE OF LOUISIANA,

Respondent.

On Petition For Writ Of Certiorari To The Louisiana Supreme Court

REPLY BRIEF OF TRACEY YOUNG

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TABLE OF CONTENTS

	Page
FACTS AND PROCEDURAL HISTORY	1
ARGUMENT	2
A. This Court has jurisdiction to review this application and to grant certiorari	2
B. The Louisiana Supreme Court has per se forbade the admissibility of eyewitness identification testimony	5
CONCLUSION	13

TABLE OF AUTHORITIES

Page

CASES

Chambers v. Mississippi, 410 U.S. 284, 93 S.Ct. 1038, 35 L.Ed.2d 297 (1973) 4

Crane v. Kentucky, 476 U.S. 683, 106 S.Ct. 2143, 90 L.Ed.2d 636 (1986) 1, 4

Daubert v. Merrell Dow Pharmaceuticals, Inc., 509 U.S. 579, 113 S.Ct. 2786, 125 L.Ed.2d 469 (1993) 1, 3, 12

Hawaii v. Office of Hawaiian Affairs, 556 U.S. ___, 129 S.Ct. 1436, 173 L.Ed.2d 333 (2009) 3

Mu'Min v. Virginia, 500 U.S. 415, 111 S.Ct. 1899, 114 L.Ed.2d 493 (1991) 5

Oregon v. Guzek, 546 U.S. 517, 126 S.Ct. 1226, 163 L.Ed.2d 1112 (2006) 3

State v. Ammons, 208 Neb. 797, 305 N.W.2d 812 (1981) 10

State v. Bozeman, 2006-679 (La. App. 5 Cir. 1/20/07), 951 So.2d 1171 (unpublished) 11

State v. Chapman, 436 So.2d 451 (La. 1983) 7

State v. Collins, 2009-0050 (La. App. 1 Cir. 8/12/09) 11, 12

State v. Ford, 608 So.2d 1058 (La. App. 1 Cir. 1992) 8, 9

TABLE OF AUTHORITIES – Continued

Page

State v. Foret, 628 So.2d 1116 (La. 1993) 1, 3

State v. Higgins, 2003-1980 (La. 4/1/05), 898 So.2d 1219, *cert. denied*, 546 U.S. 883, 126 S.Ct. 182, 163 L.Ed.2d 187 (2005) 9, 10, 11

State v. Stucke, 419 So.2d 939 (La. 1982) .....*passim*

United States v. Smith, 621 F.Supp.2d 1207 (M.D. Ala. 2009) 3

Washington v. Texas, 388 U.S. 14, 87 S.Ct. 1920, 18 L.Ed.2d 1019 (1967) 2

STATUTES

28 U.S.C. §1257(a) 2

Louisiana Code of Evidence article 403 .....4, 9

Louisiana Code of Evidence article 702 .....4, 8

CONSTITUTIONAL PROVISIONS

Fourteenth Amendment 4

Sixth Amendment 4

FACTS AND PROCEDURAL HISTORY

Pending before this Court is the Petition for Writ of Certiorari by Tracey Young, indicted for first-degree murder in Louisiana. The State of Louisiana seeks the death penalty. Young's application challenges whether the Louisiana Supreme Court's proscription of an eyewitness identification expert violates his constitutional right to present a defense under the Sixth Amendment of the United States Constitution.

Moreover, Young alleges that the Louisiana ruling – in which the state Supreme Court emphatically held that it declined to overrule a prior decision "barring the admissibility of eyewitness identification testimony" – prevents the state trial court from ever deciding whether the proposed testimony meets the requirements for admissibility of scientific testimony espoused by this court in *Daubert v. Merrell Dow Pharmaceuticals, Inc.*, 509 U.S. 579, 113 S.Ct. 2786, 125 L.Ed.2d 469 (1993), and adopted in Louisiana in *State v. Foret*, 628 So.2d 1116 (La. 1993).

Young also contends that the Louisiana Supreme Court decision prevents him from a "meaningful opportunity" to present a complete defense, *Crane v. Kentucky*, 476 U.S. 683, 106 S.Ct. 2143, 90 L.Ed.2d 636 (1986), quoting *California v. Trombetta*, 467 U.S. 479, 104 S.Ct. 2528, 81 L.Ed.2d 413 (1984), in that it violates this Court's prohibition against state rules of evidence that exclude "whole categories" of testimony on the basis of a presumption of unreliability. *See*

Washington v. Texas, 388 U.S. 14, 87 S.Ct. 1920, 18 L.Ed.2d 1019 (1967).

Thus, Young files this Petition for Writ of Certiorari asking this Court to resolve the question of whether the *per se* proscription of eyewitness identification expert testimony violates a criminal defendant's constitutional right to present a defense.

Initially, the State of Louisiana waived its right to file an opposition brief. Now, in its response filed pursuant to an order of this Court, the State of Louisiana claims that this Court lacks jurisdiction to consider Young's Petition for Writ of Certiorari on the grounds that (1) the Louisiana courts did not consider the federal question Young now presents, and (2) Louisiana has not adopted a *per se* rule concerning expert eyewitness identification testimony.

Young files this reply brief, contending that prior opinions from this Court grant it jurisdiction to reverse the Louisiana decision.

ARGUMENT

A. This Court has jurisdiction to review this application and to grant certiorari.

Under 28 U.S.C. §1257(a), this Court has jurisdiction to review a final judgment or decree from the highest court of a state where the validity of a treaty or statute of the United States is at question or where the validity of a statute of any state is repugnant to

the Constitution or laws of the United States. This Court has interpreted this provision to grant it jurisdiction to review state-court determinations that rest upon federal law, *Oregon v. Guzek*, 546 U.S. 517, 126 S.Ct. 1226, 163 L.Ed.2d 1112 (2006), or decisions that are interwoven with federal law. *Hawaii v. Office of Hawaiian Affairs*, 556 U.S. ___, 129 S.Ct. 1436, 173 L.Ed.2d 333 (2009), citing *Michigan v. Long*, 463 U.S. 1032, 103 S.Ct. 3469, 77 L.Ed.2d 1201 (1983).

A simple reading of the *Young* decision demonstrates that the decision rests upon, and is interwoven with, federal law.

First, the Louisiana Supreme Court decision now prevents state trial courts from performing its "gatekeeping" duty articulated in *Daubert*, where this Court established the principles trial courts should employ when evaluating expert testimony. The core of this Court's ruling in *Daubert* is that lower courts must consider whether the methodology underlying the proposed testimony is scientifically valid and whether the reasoning or methodology can be applied to the facts at issue. As this Court held – and the Louisiana Supreme Court adopted in *Foret* – the admissibility determination is a function reserved to the trial court. A per se proscription against all eyewitness identification expert testimony prevents a trial court from performing this function and violates *Daubert*'s rule against "eschew[ing] such categorical prohibitions of entire classes of expert conclusions." *United States v. Smith*, 621 F.Supp.2d 1207, 1211 (M.D. Ala. 2009). In this respect, the *Young* decision is

not only interwoven with federal law, it violates established principles of this Court.

Second, the categorical prohibition of expert eyewitness testimony violates the defendant's right to present a defense. The right of an accused to present a defense is one of the most fundamental Constitutional rights. *Chambers v. Mississippi*, 410 U.S. 284, 93 S.Ct. 1038, 35 L.Ed.2d 297 (1973). It is rooted in the Due Process Clause of the Fourteenth Amendment and in Confrontation Clauses of the Sixth Amendment, *Crane*, supra. Its protection is not predicated on whether the defendant invokes the right, a claim that the State of Louisiana relies upon in an effort to convince this Court that it does not have jurisdiction.

In support of its argument, the State of Louisiana contends that the only issue considered by the state courts involved whether witness Dr. Roy Malpass was competent to testify under Louisiana Code of Evidence articles 403 and 702. Judging Dr. Malpass's competency is not what the Louisiana Supreme Court addressed in the *Young* decision. While the court held that Malpass's testimony was inadmissible, it did so by reaffirming a long-standing rule "barring the admissibility of eyewitness identification testimony." *Young*, 2009-1177, p. 14 (La. 4/5/10), 35 So.3d 1042, 1051. In other words, the Louisiana Supreme Court ruled that Dr. Malpass could not testify because in Louisiana eyewitness identification testimony is never admissible. This absolute prohibition against calling an expert in

eyewitness identification denies Young the right to present a defense; it violates a most basic federal rule of the United States Constitution, which this Court has jurisdiction to enforce. *Mu'Min v. Virginia*, 500 U.S. 415, 111 S.Ct. 1899, 114 L.Ed.2d 493 (1991).

Third, and finally, the State of Louisiana ignores the plethora of federal court decisions that the Louisiana Supreme Court relied upon to make its decision. The state court interweaves the federal law to distinguish what it perceives to be the prejudicial nature of expert eyewitness testimony. It relies upon these federal cases to support its decision to exclude expert eyewitness testimony. Given this extensive reliance on federal law and federal jurisprudence, the State of Louisiana cannot overcome that sufficient jurisdictional grounds exist for this Court to review the Louisiana Supreme Court decision.

B. The Louisiana Supreme Court has per se forbade the admissibility of eyewitness identification testimony.

Although the Louisiana Supreme Court majority opinion did not use the term, *per se*, it clearly adopted a bright-line or "*per se*" rule that bars the admissibility of eyewitness identification testimony. *See Young*, 2009-1177, pps. 13-14 (La. 4/5/10), 35 So.3d at 1050 (. . . we decline to overrule our decision in *Stucke* barring the admissibility of eyewitness identification

testimony).[1] The Louisiana court eliminated the possibility of the introduction of such testimony and does not, as the State of Louisiana now argues, permit such testimony on a case-by-case basis. The poignant evidence in support of this position is the complete absence of any indication by the Louisiana court of the circumstances in which such testimony would be admissible.[2]

The line of decisions in Louisiana that addresses expert testimony on eyewitness identification began with *Stucke*, where the defendant claimed that the trial court erred in excluding the testimony of an expert concerning the quality of a Jefferson Parish

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[1] Young takes issue with the State of Louisiana's position that he misstates the law. Young clearly indicated in his application, p. 8, fn. 3, that the Louisiana Supreme Court did not use the term *per se* in its opinion. However, see Justice Johnson's concurrence where she argued against the majority's bright-line rule. ("However, I disagree with the majority's finding that *State v. Stucke*, 419 So.2d 939 (La. 1982) serves as a complete bar to the admission of expert testimony regarding eyewitness identification."). Also note that Justice Knoll, also in concurrence, took the position that such testimony is never admissible. ("Therefore, in my view, the resolution of the issue in this case concerning the admissibility of expert testimony regarding this 'junk science' is best resolved by the adoption of a *per se*/bright-line rule of inadmissibility"). 35 So.3d at 1051.

[2] It is ironic that in order to have this Court avoid reviewing this opinion the State of Louisiana now argues that the Louisiana Supreme Court did not adopt a *per se* or bright-line rule. In its brief to the Louisiana Supreme Court, the State vehemently argued that the *Stucke* decision and its progeny established a clear bright-line rule that precludes the admissibility of such testimony.

Sheriff's Office deputy, who, while off-duty, became involved in the chase of an armed robber. The deputy, who was shot while chasing Stucke, identified the defendant from a photographic lineup and later from a physical line-up. In considering this issue for the first time, the Louisiana Supreme Court concluded that the testimony of a psychologist would not assist the jury in its fact-finding mission. The psychologist was called to testify to enlighten the jury as to the quality of the victim's (the deputy's) identification.

The Louisiana Supreme Court noted that the trial court had grave doubt about the competency of the evidence, particularly the expert's methodology – the manner in which the expert created incidents for case crimes and staged them in live situations – and the number of variables in the experiments. It applied the rationale from select cases from outside Louisiana to conclude

> that the prejudicial effect of such testimony outweighs its probative value because of the substantial risk that the potential persuasive appearance of the expert witness will have a greater influence on the jury than the other evidence presented during the trial. Such testimony invades the province of the jury and usurps its function.

Stucke, 419 So.2d at 945.

That decision was not modified, as contended by the State of Louisiana, in the *State v. Chapman*, 436 So.2d 451 (La. 1983) decision. While expert testimony

on eyewitness identification was permitted, the admissibility of that testimony was **not** an issue before the Louisiana Supreme Court making the court's reference to that admission dicta. (Emphasis added).

Ten years after *Stucke*, the Louisiana First Circuit Court of Appeal considered the issue of whether an expert on eyewitness identification should be permitted to testify in light of the Louisiana Supreme Court's prior holdings and the enactment of the new Louisiana Code of Evidence that was adopted in 1988 and became applicable January 1, 1989. In *State v. Ford*, 608 So.2d 1058 (La. App. 1 Cir. 1992), the victim was held at gunpoint as she exited her vehicle outside her home. Both the victim and a passerby identified the defendant in a photo lineup. The passerby also identified the defendant in an out-of-court physical line-up. The defendant sought to present expert testimony on eyewitness identification to challenge the fallacy of the identifications. The trial court denied Ford's motion.

The Louisiana First Circuit found no merit to the defendant's assignment of error. It cited two new provisions as applicable, Louisiana Code of Evidence article 702, which provides:

> If scientific, technical, or other specialized knowledge will assist the trier of fact to understand the evidence or to determine a fact in issue, a witness qualified as an expert by knowledge, skill, experience, training, or

> education, may testify thereto in the form of an opinion or otherwise,

and, Louisiana Code of Evidence article 403, which states:

> Although relevant, evidence may be excluded if its probative value is substantially outweighed by the danger of unfair prejudice, confusion of the issues, or misleading the jury, or by considerations of undue delay, or waste of time.

The appellate court found *Stucke* consistent with the evidence articles regarding expert testimony and found both applied to Ford's allegations:

> Herein, there was testimony from which the jury could determine the facts based on common knowledge, education, and experience. The opinion evidence about the fallibility of human perception and memory in general was not necessary for the jury to resolve the identity issue.

Ford, 608 So.2d at 1061.

Since then, the appellate courts in Louisiana have continued to affirm trial court rulings that deny expert testimony on eyewitness identification on the basis that any benefit from the proffered testimony would be outweighed by its creation of confusion and undue influence.

The Louisiana Supreme Court reaffirmed its *Stucke* position in *State v. Higgins*, 2003-1980 (La.

4/1/05), 898 So.2d 1219, *cert. denied*, 546 U.S. 883, 126 S.Ct. 182, 163 L.Ed.2d 187 (2005), where a witness, who followed the victim out of a barroom after a night of drinking, came forth to identify the defendant 17 months after the alleged murder. The defendant wished to call an expert in eyewitness identification who would have testified regarding the reliability of eyewitness testimony, specifically, to explain that

> intoxication greatly increases the likelihood of false identification, that little correlation exists between the confidence expressed by an eyewitness and the actual reliability of that witness's identification, that the chance of misidentification increases with the length of time between incident and identification, and that facts gathered from secondary sources after observing the event in question tend to skew a witness's perception of that event.

Higgins, 2003-1980, p. 33 (La. 4/1/05), 898 So.2d at 1240.

Again the Louisiana Supreme Court found that the trial court properly excluded such evidence, relying in part on the Nebraska case of *State v. Ammons*, 208 Neb. 797, 305 N.W.2d 812 (1981), which held that the prejudicial effect of a psychologist's testimony on a witness's identification outweighs its probative value. This Court also reaffirmed its holding from *Stucke*, that the risk of expert testimony on eyewitness identification "will have a greater

influence on the jury than other evidence presented at trial," and such evidence presents the danger of "invad[ing] the field of common knowledge, experience, and education of men . . . " *Stucke*, 419 So.2d at 945; *Higgins*, 2003-1980, p. 33 (La. 4/1/05), 898 So.2d at 1240.

At least twice since *Higgins*, Louisiana courts found no error in the trial court's exclusion of expert testimony on eyewitness identification. In *State v. Bozeman*, 2006-679 (La. App. 5 Cir. 1/20/07), 951 So.2d 1171, the Louisiana Fifth Circuit Court of Appeal found that the trial court did not abuse its discretion in refusing to allow the defendant to present expert testimony on eyewitness identification because the testimony was offered to challenge the credibility of the victim's identification. And in *State v. Collins*, 2009-0050 (La. App. 1 Cir. 8/12/09) (unpublished), the Louisiana First Circuit Court of Appeal again affirmed a trial court ruling to exclude expert testimony on eyewitness identification in a second-degree murder case where a witness, who admitted he never saw the defendant shoot at him or the victim, allegedly selected the defendant from a photographic line-up. While the appellate court found that the trial court did not abuse its discretion in excluding the testimony of an expert on eyewitness identification, it indicated that the trial court's ruling may have been harmless error. Moreover, the court noted that its ruling on this issue was limited to the circumstances of the particular case.

> While the circumstances of the instant case do not warrant a finding of abuse of discretion on the part of the trial court in excluding the proffered expert testimony on the issue of eyewitness identification, we note that jurisprudence has recognized instances where the exclusion of such testimony would warrant reversal, such as where eyewitness testimony provides the sole basis for identifying a defendant.

Collins, 2009-0050, p. 6, fn. 3.

Young goes much further than these opinions and now effectively closes the door to even the possibility of introducing such testimony. It does not permit – as each of these previous opinions seem to indicate – the trial court to judge the admissibility of eyewitness identification testimony against the particular facts of a particular case. Rather, *Young* is a complete bar to the admissibility of eyewitness identification testimony. Nowhere in the opinion does the Louisiana Supreme Court leave open the possibility that such testimony may be admissible or that the trial court can perform its duty in determining the reliability and admissibility of such testimony as outlined in *Daubert*. And as articulated in the Writ of Certiorari, the *Young* decision operates as an unconstitutional bar against a defendant's right to present a defense.

CONCLUSION

This Court has jurisdiction to review and to grant certiorari in this case. The Louisiana Supreme Court opinion directly affects and is interwoven with Tracey Young's right under the federal Constitution to present a defense. Moreover, under the opinion a criminal defendant in Louisiana is now barred, *per se*, from presenting eyewitness identification testimony. If the decision permitted such testimony as the State of Louisiana contends, then the Louisiana Supreme Court would not have overlooked, as it did, that the trial court did not rule Dr. Roy Malpass's testimony admissible, only that it met the reliability test under *Daubert*.

Now, under *Young*, a trial court cannot even perform that gatekeeping role.

Young, therefore, reiterates his Petition for Writ of Certiorari.

Respectfully submitted,

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